
Recent Developments in International Cartel Law Enforcement

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Scope of Today's Presentation

1. Civil enforcement
2. Criminal enforcement
3. Globalisation of fight against cartels
4. Leniency systems
5. Settlement procedures
6. Private actions



European cartel enforcement

Cartel enforcement in the EU continues to be a high priority.



“I will focus on fighting against cartels [...] in any sector or any country in Europe”

“There should be no doubt about our determination to unearth and punish cartel members”

Joaquín Almunia, EU Competition
Commissioner

“In the antitrust field, the fight against cartels has been a priority over the last years and it will undoubtedly continue. In 2010 we have taken a strong stand against harmful cartels, be it in the field of consumer appliances, animal feeds or transport. We have also successfully developed our experience with our new cartel settlement tool. In 2011 we will strive to improve our ex officio detection of cartels, to reduce the average duration of investigations and to ensure efficiency and uniformity in our cartel settlements.”

DG Competition Management Plan 2011



EU: Ten highest cartel fines per case

| Fine | Number of Undertakings involved | Product | Year |
|-------------|--|---------------------------|-------------|
| € 1,384 m | 4 undertakings | car glass | 2008 |
| € 1,106 m | 2 undertakings | gas | 2009 |
| € 992 m | 4 undertakings | elevators | 2007 |
| € 799 m | 11 undertakings | air cargo carriers | 2010 |
| € 791 m | 8 undertakings | vitamins | 2001 |
| € 751 m | 11 undertakings | gas-insulated switchgears | 2007 |
| € 676 m | 10 undertakings | paraffin waxes | 2008 |
| € 648 m | 6 undertakings | LCD panels | 2010 |
| € 622 m | 17 undertakings | bathroom fittings | 2010 |
| € 519 m | 5 undertakings | synthetic rubber | 2006 |

EU: Ten highest cartel fines per company

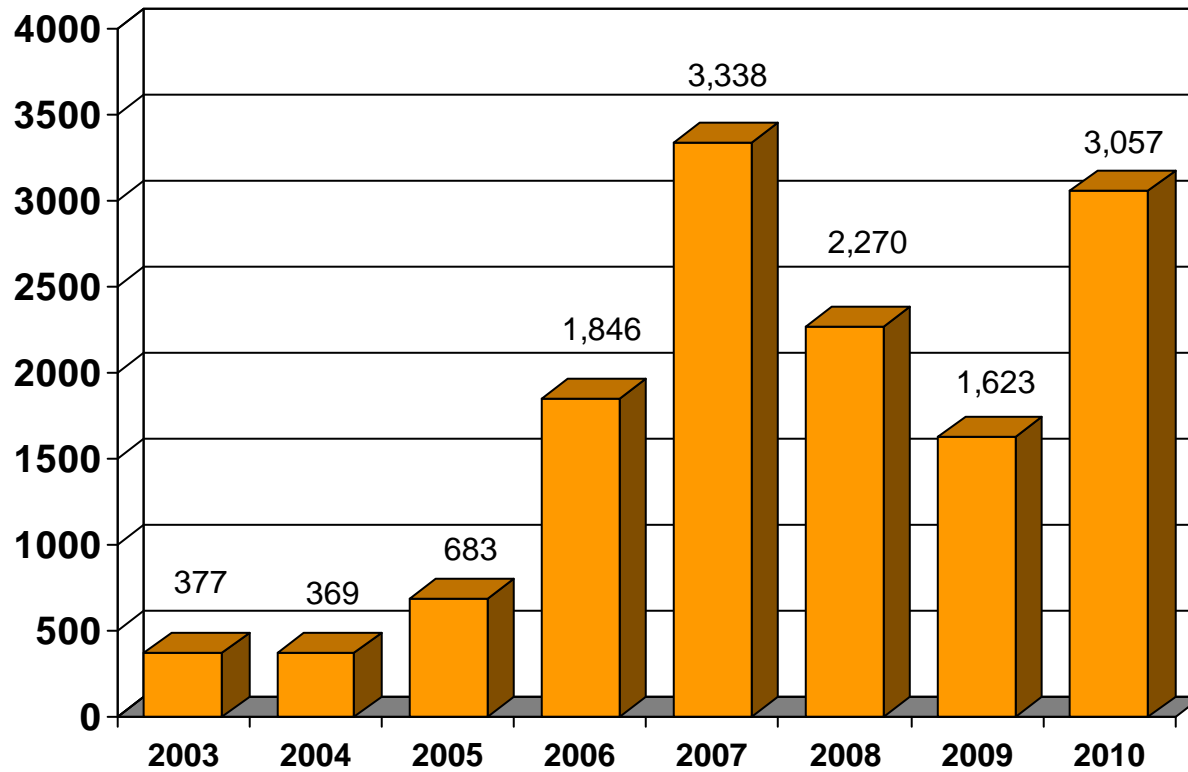


| Year | Fine in € million | Company | Product |
|------|-------------------|-------------------------|--------------------------|
| 2008 | € 896 | Saint Gobain | Car glass |
| 2009 | € 553 | E.ON | Gas |
| 2009 | € 553 | GDF Suez | Gas |
| 2007 | € 480 | ThyssenKrupp | Elevators and escalators |
| 2001 | € 462 | F. Hoffmann-La Roche AG | Vitamins |
| 2007 | € 397 | Siemens AG | Gas insulated switchgear |
| 2008 | € 370 | Pilkington | Car glass |
| 2010 | € 326 | Ideal Standard | Bathroom fittings |
| 2008 | € 318 | Sasol Ltd | Candle waxes |
| 2010 | € 310 | Air France/KLM | Airfreight |



EU: Cartel fines per year

**Fine totals in €million
(adjusted for court judgments)**

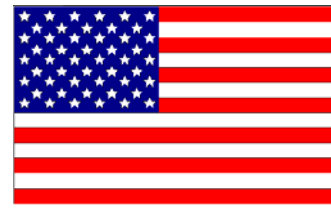


Fines by national competition authorities

| | |
|---|--|
|   Interbank fees €384.9 million |   Cement €100 million |
|  Tobacco €255 million  |  Coffee €159.5 million  Ophthalmic lenses €115 million |

Fines are only the tip of the iceberg...





US criminal enforcement

“We remain convinced that the single best deterrent to cartel behaviour is the imposition of meaningful prison sentences against the guilty individuals.”

“Recently, we have sought the imposition of prison sentences with increasing frequency and sought long periods of incarceration.”

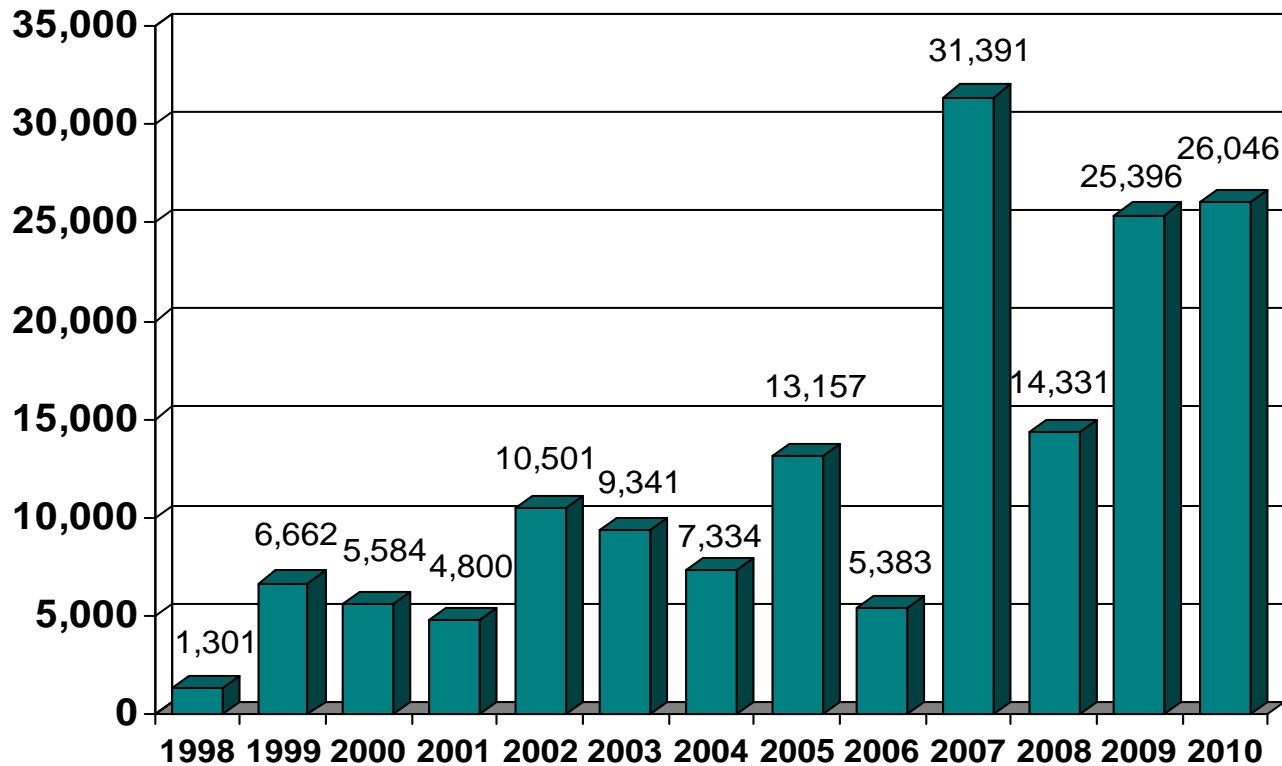
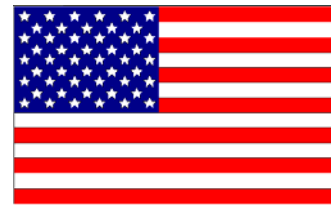


“The Antitrust Division's criminal enforcement program in recent years has obtained unprecedented success in cracking large domestic and international cartels, resulting in increasingly higher criminal fines and longer jail sentences for offenders.”

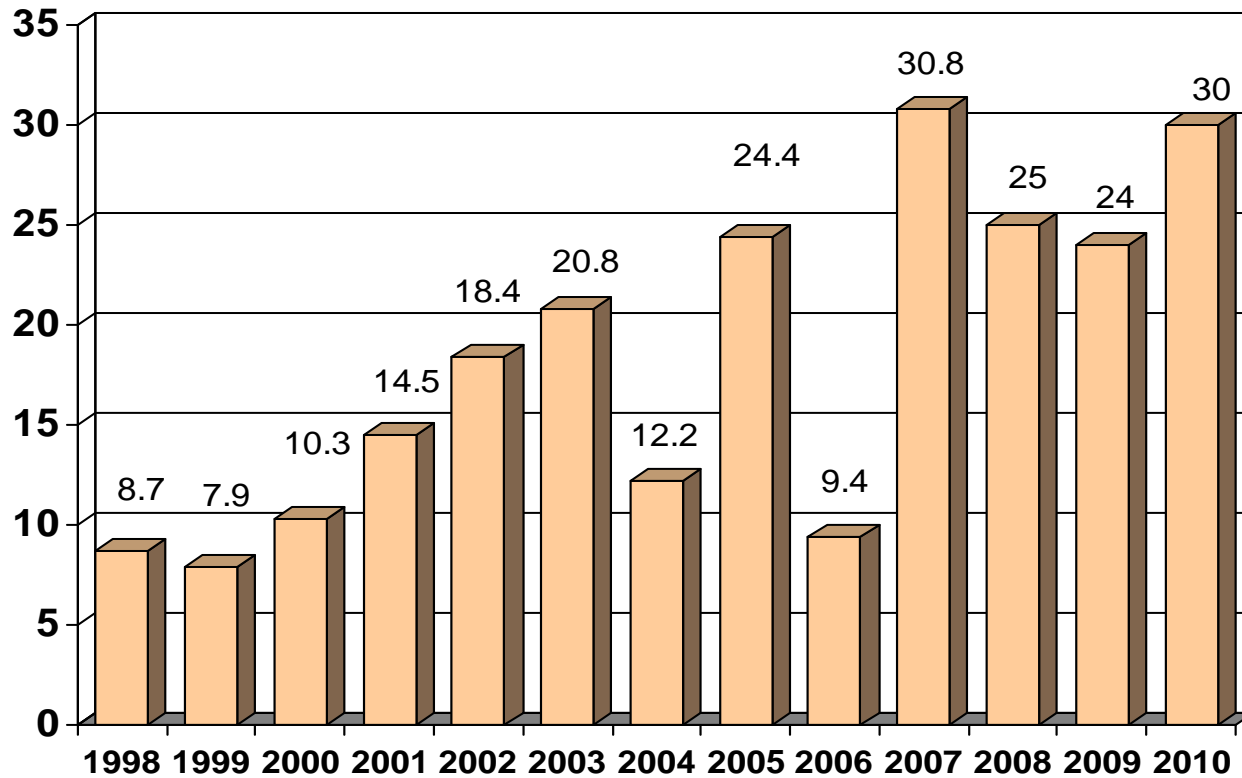
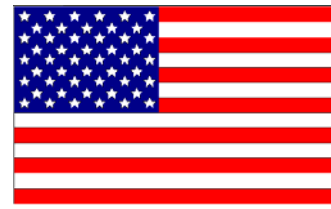
(Assistant Attorney General Christine Varney, 12 May 2010)



US prison sentences: Total days imposed



US prison sentences: Average length (months)



Globalisation of cartel enforcement

- ▶ Increased cooperation and information sharing among global antitrust agencies
 - Mutual Legal Assistance Treaties and International Antitrust Enforcement Assistance Agreements
 - Coordination of search warrants and dawn raids
 - Sharing of strategies

- ▶ Violations in one jurisdiction may be communicated to many other jurisdictions
 - Company placed on “watch list”
 - Increased risk of investigation in other jurisdictions of companies considered not to be competition compliant



Fast developing regimes

▶ Brazil



- More than 220 search and seizure warrants served in 2007-2010 as opposed to 30 in 2003-2006
- Criminal prosecution of over 230 individuals / 34 executives found guilty
- Record fine of 2.9 billion reais (€1.3 billion) imposed by CADE in 2010 in a industrial gases cartel

▶ China



- SAIC (China's State Administration of Industry and Commerce) just released guidelines

▶ India



- Increased enforcement powers granted to the newly-created Competition Commission
- Approximately 20 cartels under investigation

Dawn raids by competition authorities are getting tougher



1. Larger teams of investigators

2. Simultaneous raids on multiple office sites



3. Co-ordination between antitrust agencies



International
Competition
Network



6. Competition authorities have state of the art forensic search tools and techniques for carrying out IT searches



5. Dawn raids on private homes



4. Greater use of interviews and more extensive interviews

Fight to obstructions to dawn raids

- ▶ EU Commission
 - EUR 38 million fine on E.ON for breach of a seal during antitrust inspection (confirmed by General Court)
 - Statement of objections sent to Sanofi-Aventis for requesting French search warrant (dropped following acknowledgement that Commission decision was sufficient)
 - Oral hearing for energy company J&T scheduled for March 2011 for blocking access to email account during inspection
- ▶ National Authorities
 - Dutch NMa fined SaraLee Household & Bodycare EUR 269,000 for the breach of a seal during antitrust inspection
 - Spanish CDC fined office supplies maker Grafoplas EUR 161,000 for obstructing inspections (some documents disappeared during the raid)



Marine hoses international cartel investigation



- ▶ Eight foreign executives arrested in Houston, Texas during a trade show on 2 May 2007 for conspiracy to rig bids, fix prices, and allocate markets for sales of marine hoses
- ▶ Parallel investigations by DOJ, European Commission and the OFT (tipped off by Yokohama)
- ▶ Investigations also launched by agencies in Japan, Korea and Australia



This investigation has not only netted record-setting jail sentences but has involved unprecedented coordination with the United Kingdom.

Thomas Barnett, Assistant Attorney General, Antitrust Division

Air cargo international cartel investigation

▶ **US**

- over US\$ 1.6 billion imposed in criminal fines (largest total for a single antitrust investigation in the US)
- charges against 18 airlines and 8 executives
- prison sentences imposed on 4 executives
- DoJ has signalled that more fines and sentences may be yet to come

▶ **EU:** almost € 800 million imposed in fines on 11 airlines

▶ **Japan:** US\$ 92.4 million in fines imposed on 11 companies

▶ **Australia:** fines of US\$ 16 million on 3 companies

▶ **Canada:** fines of US\$ 10 million on 3 companies



Role played by leniency programmes

- ▶ One of the most important tools for cartel detection
- ▶ Allow undertakings and individuals to obtain total or partial immunity in return for:
 - ending participation in the cartel, and
 - co-operating with regulatory authorities
- ▶ Around 50 jurisdictions worldwide operate leniency programmes (continuously increasing)
- ▶ Approximately 60% of EU decisions follow from leniency applications

The EU leniency regime in a nutshell



1. Category A – Immunity
2. Category B – Fine reduction

| | Reduction | Who | Trigger | Evidence threshold |
|------------|----------------------------|-------------------------------|---|--|
| Category A | 100% (immunity) | “No. 1” (“whistle-blower”) | i) No dawn raid yet ii) No decisive evidence yet | i) Will make targeted inspection possible (p. 8 (a)) ii) Will make infringement finding possible (p. 8 (b)) |
| Category B | 30-50% (fine reduction) | “No. 2” | Immunity not available | “significant added value” (p. 24) |
| | 20-30% (fine reduction) | “No. 3” | | |
| | 0-20% (fine reduction) | anyone else | | |

Immunity – top issues in getting there

- ▶ Whether to apply for immunity at all?
 - best case: no fine, but....
 - risk of:
 - third-party damages claims
 - individual civil and criminal liability
 - significant costs

- ▶ Where to apply?
 - even within EU no one-stop-shop
 - leniency systems in place in all Member States (except Malta)
 - ensure protection through ‘Model Programme’ based short form applications



Immunity – top issues in keeping it

- ▶ Ensure discontinuation of infringement
 - down to the last employee
- ▶ Keep confidential
 - need to avoid tipping off co-conspirators
- ▶ Provide promptly all evidence
 - particular focus on documentary evidence
- ▶ Real threat of losing conditional immunity in case of non-compliance



Leniency: timing is of essence

- ▶ If leniency is sought, every minute counts:
 - Asahi (Car Glass) saved €114m
 - Sasol (Paraffin Wax) saved €320m
- ▶ Spain: queue at the registry when leniency regime was introduced
- ▶ Hydrogen Peroxide case: difference of minutes on fax taken into account to determine reduction band
- ▶ Importance of engagement with decision makers at earliest opportunity. Delay in senior management sign-off can result in loss of considerable discounts



Settlements in the EU

- ▶ On 30 June 2008, the Commission introduced a settlement procedure for cartels
- ▶ *“This new settlement procedure will reinforce deterrence by helping the Commission deal more quickly with cartel cases, freeing up resources to open new investigations. Companies which are convinced that the Commission can prove their involvement in a cartel, will also benefit from quicker decisions and a fine reduction”* (Neelie Kroes; 30 June 2008)
- ▶ Parties, having seen the evidence in the Commission’s file (from which it appears that the Commission can prove their involvement in a cartel), choose to acknowledge their involvement in the cartel and the liability for it
- ▶ In return, the Commission can reduce the fine imposed by 10 (on top of the leniency reduction)



Potential pros and cons of settlement

| ISSUE | SETTLEMENT | NO SETTLEMENT |
|-------------------------------------|--|--|
| Fine reduction | 10% reduction | No reduction |
| Impact on EC's case | Potential greater impact on EC's objections, but not plea-bargaining | Harder to influence EC's objections |
| Process | Less onerous and less costly (unless settlement fails) | Onerous and costly process (includes an oral hearing and possibly an appeal) |
| Timing of objections and fine level | Indication of EC's objections and level of fine at an early stage | EC's objections revealed in SO, and fine revealed in decision |
| Rights of defence | Limited access to file, no oral hearing and limited scope for appeal | Full rights of defence |
| Reputation | Containment of reputational damage | No containment of reputational damage |
| Damages claims | Accelerates potential claims, but shorter decision | No impact on timing, but more detailed decision |

Damage Claims

- ▶ Customers have a right to be compensated for payment of increased cartel prices
- ▶ Customers have a right to damages for the entire period of the cartel
- ▶ Defendants are jointly and severally liable
- ▶ Active promotion of private actions by antitrust agencies
- ▶ Managers of customers frequently have a corporate obligation to claim damages from their suppliers
- ▶ Growing number of firms specialising on damage claims

ATTENTION ~ ATTENTION ~ ATTENTION ~ ATTENTION

PURCHASERS OF EPDM
(ETHYLENE PROPYLENE DIENE MONOMER)

IF YOU OR YOUR COMPANY

**PURCHASED ROYALENE® EPDM
DIRECTLY FROM UNIROYAL**

AND/OR

**PURCHASED NORDEL® EPDM
DIRECTLY FROM DuPONT DOW**

**FROM JAN. 1, 1996 TO PRESENT,
YOU MAY HAVE A CLAIM FOR**

TRIPLE MONEY DAMAGES

On Dec. 12, 2002, CROMPTON CORPORATION announced the U.S. Department of Justice (U.S.D.O.J.), the European Union and the Canadian Competition Bureau had conditionally granted it amnesty with regard to criminal prosecution and fines for fixing the prices of EPDM. (CROMPTON acquired its EPDM business in 1996 when it merged with UNIROYAL CHEMICAL CORPORATION)

On Dec. 13, 2002, DuPONT DOW ELASTOMERS confirmed the U.S.D.O.J. had requested that it provide documents relative to the U.S.D.O.J.'s EPDM price fixing investigation.

If you or your company purchased Royale® EPDM directly from Uniroyal and/or Norde® EPDM directly from DuPont Dow from Jan. 1, 1996 to present, you may have a claim for triple money damages under the United States antitrust laws. For more information, call attorney Warner Mendenhall now at (330) 535-9160.

To learn more about your rights and potential claim for
TRIPLE MONEY DAMAGES,
Call Warner Mendenhall,
Attorney at Law

(330) 535-9160



Private actions in the EU

- ▶ ‘Follow-on actions’ after Commission decisions increasing in recent years
- ▶ Commission is adopting initiatives to encourage more private actions, the ‘final piece of the enforcement jigsaw puzzle’

“Every year, large numbers of small businesses and ordinary people in the EU are effectively deprived of their rights as economic actors and as citizens. Together, we can forge a new shield to defend their rights and protect their interests.”

(EU Commissioner Joaquín Almunia, 15 October 2010)

- ▶ Green Paper on antitrust damages actions (2005) and White Paper in (2008)
- ▶ External Study in view of making damage claims more efficient, whilst ensuring respect for European legal systems and traditions (2010)
- ▶ EU Draft Directive withdrawn in 2009 but revised proposal announced before the end of 2011
- ▶ Consultation launched in February 2011
- ▶ Tension between DG Comp and DG Enterprise on risk of over-deterrence

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